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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1983

No.83-426

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DETECTIVE JUAN SANCHEZ, SERGEANT ROBERT  
PEZZANO, and POLICE OFFICERS MICHAEL  
CIRAVOLO and PATRICIA HEAR,

Petitioners,

-v.-

IVY McFADDEN, as Administratrix of the  
Estate of GREGORY ISIAH McFADDEN a/k/a  
GREGORY McFADDEN and ABDUL HADI,  
Deceased,

Respondent.

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ANSWERING BRIEF OF RESPONDENT IN  
OPPOSITION TO PETITIONERS' APPLICATION  
FOR WRIT OF CERTIORARI

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On the brief

# TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE CASE.....	1
ARGUMENT -	
THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI. THE NEW YORK STATE SUR- VIVAL STATUTE (EPTL SECTION 11-3-2) WAS AMENDED ON SEPTEMBER 1, 1982 TO INCLUDE THE AWARD OF PUNITIVE DAMAGES IN WRONGFUL DEATH ACTION. THEREFORE ANY DECISION IN THIS CASE REGARDING THE OLD STATUTE HAS A VERY LIMITED EFFECT. FURTHERMORE, THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT WAS CORRECT ON THE LAW AS IT EXISTED BEFORE SEPTEMBER 1, 1982.....	3
POINT I	
THERE ARE NO COMPELLING CIRCUMSTANCES WARRANTING THE GRANT HEREIN OF A WRIT OF CERTIORARI.....	3
POINT II	
THE DECISION BELOW IS CORRECT ON THE LAW.....	6
CONCLUSION.....	15

# TABLE OF AUTHORITIES

Page

## Cases:

<u>Aumiller v. University of Delaware</u> , 434 F. Supp. 1273 (D.C.Del 1977).....	7
<u>Basista v. Weir</u> , 340 F.2d 74 (3rd Cir.1965).....	7, 12
<u>Bell v. Hood</u> , 327 U.S.678 (1946)	
<u>Brazier v. Cherry</u> , 293 F.2d 401 (5th Cir. 1961).....	12, 14
<u>Caperci v. Huntoon</u> , 397 F.2d 799 (1st Cir.1968) cert.den. 393 US 940.....	7, 13
<u>Chubbs v. New York</u> , 324 F.Supp 1183 (S.D.N.Y.1971).....	7
<u>Cook v. Miami</u> 464 F.Supp 737 (S.D.Fla 1979).....	8
<u>Heath v. City of Hialeah</u> , 560 F.Supp 840 (S.D.Fla 1983).....	6
<u>Larson v. Wind</u> 542 F.Supp 25 (N.D.Ill. 1983).....	10
<u>McDaniel v. Carroll</u> 457 F2d 968 (6th Cir.1972).....	13
<u>Morales v. Haines</u> 486 F.2d 880 7th Cir.1973).....	7
<u>Newborn v. Morrison</u> 440 F.Supp 623 (D.C.Ill.1977).....	7

# TABLE OF AUTHORITIES

	Page
<u>O'Connor v. Several Unknown</u> <u>Correctional Officers, 523 F.</u> <u>Supp. 1345 (E.D.Va 1981).....</u>	6,9,10
<u>Stolberg v. Members of the</u> <u>Board of Trustees, 474 F.2d</u> <u>485 (2nd Cir.1973).....</u>	7
<u>Sullivan v. Little Hurting</u> <u>Park 396 US 229 (1969).....</u>	8, 12
<u>Zarcone v. Perry (2nd Cir.</u> <u>1978).....</u>	7
<u>Statutes:</u>	
42 USC Sec 1983.....	2,6,7,8, 10,11,14
42 USC Sec 1988.....	11
New York EPTL Sec.11-3.2	3,4,5
<u>Rules</u>	
Supreme Court Rules 17.1.....	4
<u>Other Authorities</u>	
Memorandum of Law Revision Commission Senate No.8620, Assembly No. 10924, Leg. Doc. (1982) No. 65 (G).....	5

### STATEMENT OF THE CASE

Plaintiff is the administratrix of the estate of Gregory McFadden, also known as Abdul Hadi, her son, who was shot in the back at close range by a police officer of the City of New York while being held by said police officer and by two other officers and being struck by a third, on February 18, 1980. Therefore the struggle involved four police officers and Mr. McFadden and not two officers as set forth in petitioners' statement of the case.

This gunshot wound resulted in his death.

Contrary to the petitioner's statement, it has never been proven, at least to a jury's satisfaction, that plaintiff's decedent was struggling for possession of any officer's gun. In fact two disinterested eyewitnesses testified that they

never saw a gun in McFadden's hand during the altercation, and defendant's disinterested witness testified that Mr. McFadden was shot (concededly in the back) while he was lying on the ground.

Plaintiff's complaint sought both compensatory and punitive damages pursuant to 42 U.S.C. Section 1983.

Through an oversight the claim for punitive damages was omitted from the pre-trial order, but was reinstated at trial by the District Court. The Court reasoned that this amendment to the pre-trial order did not substantially prejudice the defendants, because the complaint contained the claim.

The case was submitted to the jury with a special verdict form but said form did not provide for the fixing of the amount of damages for each individual defendant. The parties failed to object to the form of verdict.

The Court of Appeals for the Second Circuit remanded the case for a further trial on the amount of punitive damages and the liability of each individual defendant for said damages.

### ARGUMENT

THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI. THE NEW YORK STATE SURVIVAL STATUTE (EPTL SECTION 11-3-2) WAS AMENDED ON SEPTEMBER 1, 1982 TO INCLUDE THE AWARD OF PUNITIVE DAMAGES IN WRONGFUL DEATH ACTION. THEREFORE ANY DECISION IN THIS CASE REGARDING THE OLD STATUTE HAS A VERY LIMITED EFFECT. FURTHERMORE, THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT WAS CORRECT ON THE LAW AS IT EXISTED BEFORE SEPTEMBER 1, 1982.

### POINT I

THERE ARE NO COMPELLING CIRCUMSTANCES WARRANTING THE GRANT HEREIN OF A WRIT OF CERTIORARI

Defendants' petition fails to set forth any adequate grounds for the granting of a writ of certiorari.

Rule 17.1 of the Supreme Court Rules sets forth guidelines for the granting of said writs. The defendants have not shown any conflict between the Second Circuit's opinion herein and any other circuit's opinion or with any decision of the New York Court of Appeals.

Furthermore, no important questions of Federal law are raised in the petition, as the amendment to New York Estates, Powers, and Trusts Law Section 11-3.2 of September 1, 1982 makes consideration of the issues involved in this case moot in all cases arising after that date.

The amendment of September 1, 1983 permits the recovery of punitive damages in wrongful death cases arising in New York. In enacting the amendment, the

members of the Law Revision Commissions  
stated:

"Punitive damages are awarded to victims where the wrongful conduct causing injury was so depraved or so gross and culpable as to evince utter recklessness or was aggravated by evil or wrongful motive. They are awarded, not to compensate victims for their injuries, but to punish the wrongdoer, and to deter him and others from future misconduct of the like culpability. Because the sole purpose of punitive damages is to act as punishment and deterrence, there may be little value in awarding such damages against the estates of deceased wrongdoers except as an example to others (EBTL 11-3.2 (a)). There is, however, no good reason why punitive damages should also abate upon the death of the victim where the wrongdoer survives. There is an inconsistency and inequity under present law whereby a reckless defendant actually avoids some liability by killing his victim rather than merely injuring him. The Commission also believes that the proposed amendments may tend to prevent corporate recklessness in the tort context."

(Memorandum of the Law Revision Commission, Senate No.8620, Assembly No. 10924, Leg. Doc. (1982) No.65 (G) ).

The State Legislature realized the inadequacy and injustice of the law and corrected it. Likewise the Second Circuit

felt that the New York survival statute prior to September 1, 1982 was inadequate as a remedy in a 42 USC section 1983 action, where death resulted directly as a result of deprivation of Constitutional rights. See Heath v. City of Hialeah, 560 F. Supp. 840 (S.D.Fla 1983); O'Connor v. Several Unknown Correctional Officers, 523 F. Supp. 1345 (E.D.Va. 1981).

In any case, a decision by the Supreme Court in the instant case would be very limited as to time and place, and the consideration of the issues herein would not be worthy of the Court's efforts.

#### POINT II

THE DECISION BELOW IS CORRECT ON THE LAW.

Although there is no actual Federal survival statute, it has been held that Federal law, and not state law, should govern the question whether to award

punitive damages in a Section 1983 action. In the leading case of Basista v. Weir (1965, C.A.3 Pa.) 340 F. 2d 74, it was held that punitive damages may be awarded for violation of 42 U.S.C. Section 1983. The case of Chubbs v. New York (1971, D.C. NY) 324 F. Supp. 1183 also recognized that punitive damages may be awarded in Federal civil rights cases. Other cases holding that punitive damages may, in appropriate cases, be awarded for violation of 42 U.S.C. Section 1983 are Stolberg v. Members of Board of Trustees (1973, C.A. 2 Conn.) 474 F. 2d 485; Morales v. Haines (1973, C.A. 7 Ill.) 486 F. 2d 880; Aumiller v. University of Delaware (1977, D.C. Del.) 434 F. Supp. 1273; Caperici v. Huntoon (1968, C.A. 1 Mass.) 397 F. 2d 799; Zarcone v. Perry (1978, C.A. 2 NY) 572 F. 2d 52; Newborn v. Morrison (1977,

D.C. Ill.) 440 F. Supp. 623; Cook v. Miami  
(1979, S.D. Fla.) 464 F. Supp. 737.

In Sullivan v. Little Hunting Park,  
396 U.S. 229 (1969), this Court held that  
both Federal and state rules on damages  
may be utilized to effectively serve the  
policies expressed in federal statute.

This logically leads to the conclusion  
that if state remedies are inadequate they  
should be supplemented by federal remedies.

Federal law is not bound by the same  
strictures as state law. While tort actions  
under state law redress rights which are  
granted by the state, 42 U.S.C. Section  
1983 creates an action to redress rights  
which are part of the Supreme law of the  
land, the Constitution and the Amendments  
thereto.

The magnitude of the rights protected  
by the Federal Civil Rights Act of 1976  
set actions under Section 1983 apart from

state actions which merely protect the right to be free from assault or negligence. The compelling nature of Constitutional rights requires that strong remedies exist to redress such rights. The New York State remedy as it existed on February 18, 1980 was inadequate to redress the Constitutional wrongs done to Gregory McFadden by the abuse of governmental authorities committed by the defendants. Therefore federal law should supplement the state remedy, and punitive damages ought to be available herein.

In O'Connor v. Several Unknown Correctional Officers, Supra, the Court allowed the claim for punitive damages to survive the decedent's death, even though Virginia law did not allow for recovery of punitive damages in wrongful death cases, because the Court found that the provision of Virginia law was inconsistent with the

purpose of 42 U.S.C. Section 1983 and hence, could not be used to limit the remedies available in a civil rights action based on acts of the defendants which caused the death of the decedent.

In Larson v. Wind, 542 F. Supp. 25 (N.D.Ill. 1982) the Court applying Illinois law reached the same conclusion as the Court in O'Connor, supra. stating, "Section 1983's purpose of deterrence would be subverted by slavish application of a state survivorship rule denying punitive damages.: (at p.27).

The Court added in a footnote:

"Death claims admittedly state the strongest case for punitive damage awards, for we wish to deter most powerfully malicious and intentional deprivation of a plaintiff's civil rights resulting in death. But O'Connor did not rely on the result of the deprivation to justify by-passing the state survivorship rule; it focused instead on the state of mind that caused the deprivation. Deterrence of willful conduct is important whatever its consequence, and so punitive damages serve

the statutory goal in this type of case as well as in O'Connor.

Since the purpose of Section 1983 is to deter deprivations of civil rights by persons acting under color of state law, it befits its purpose to punish those who maliciously, willfully or recklessly abrogate those rights.

As a practical matter, compensatory damages will have no deterrent effect on the defendants in this case since compensatory damages will be paid by their employer, the City of New York. It is only through the award of punitive damages that this case will have any impact upon the defendants. Without punitive damages in this case there is no way to effectively serve the purposes of Section 1983.

Section 1983 is silent on the question of punitive damages. In such circumstances, the Court is directed by 42 U.S.C. Section 1988 to follow "the common law, as

modified and changed by the Constitution and statutes of the State wherein (the Court sits)...so far as the same is not inconsistent with the Constitution and laws of the United States...."

Surely, disallowance of punitive damages in this case is inconsistent with Section 1983's purpose.

In Bell v. Hood, 327 U.S. 678 the Supreme Court stated:

"(W)here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done. " at 684

The same reasoning was followed in Sullivan v. Little Hunting Park, supra.

In Basista v. Weir, supra., the 3rd Circuit held that a Pennsylvania law under which there could be no award for punitive damages without an award of actual

damages was inapplicable where violations of civil rights were alleged. The Court reasoned that the Civil Rights Acts were intended to have uniform effect throughout the United States and that federal common law, rather than state law must be applied to effect such uniformity.

Again in Caperci v. Huntoon, 397 F. 2d 799 (1968 C.A.1 Mass.), cert. den. 393 U.S. 940 the Court allowed recovery of punitive damages under federal common law, where state law would not have allowed the recovery of punitive damages. The Court reasoned that the purpose of Section 1983 is better served by avoiding local variations with respect to recovery.

State law may be used on the issue of damages where it better serves federal policies. McDaniel v. Carroll, 457 F.2d 968 (1972 C.A.6 Tenn.).

The Court in McDaniel applied a state law which made a sheriff and his surety liable for punitive damages for torts

committed by a deputy sheriff. Federal law was silent on this matter.

In the case at bar the purposes of Section 1983 are better served by the federal common law.

In the case of Brazier v. Cherry, 293 F. 2d 401 (5th Cir.1961), the Court succinctly states in regard to 42 U.S.C. Section 1988 that "it reflects a purpose on the part of Congress that the redress available will effectuate the broad policies of the Civil Rights Statutes. If the federal law is "suitable to carry the (policy) into effect" resort to local law is not required."

It is further stated in the same case: "It defies history to conclude that Congress purposely meant to assure to the living freedom from such unconstitutional deprivations, but that, with like precision, it meant to withdraw the protection of Civil Rights Statutes against the peril of

death. The policy of the law and legislative aim were certainly to protect the security of life and limb as well as property against these actions. Violent injury that would kill was not less prohibited than violence which would cripple."

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI  
HEREIN SHOULD BE DENIED.

October 11, 1983

Respectfully Submitted,  
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